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8/22/83

DECISION AND RECOMMENDATION

On February 15, 1979, petitioner entered into an agreement with, ---, a Bermuda corporation with no offices in California, to modify a Boeing 727 aircraft owned by ---. The modification included refurbishment of the interior for executive use, replacement of fuel tanks and upgrading of avionics and electrical equipment on the aircraft. The work was to be done at petitioner's Burbank facility. Petitioner was required to deliver the aircraft outside California and

--- certified that the aircraft modification was purchased for use outside California. The aircraft was to be delivered by December 20, 1979, initially, but the delivery date was later changed by mutual agreement to January 3, 1980. The aircraft was to be delivered by --- petitioner on February 23, 1979.

Completion of the work was delayed, and --- became dissatisfied with petitioner's performance. On December 20, 1980, at which time only a small amount of work remained to be done, agents of --- surreptitiously removed the aircraft from petitioner's facilities and flew it to New York. Petitioner reported the taking of the aircraft to the Los Angeles Police Department as a theft. When the circumstances of the taking were discovered, and the aircraft was discovered to be in possession in New York, no further criminal action was taken.

Petitioner had not been paid for a substantial amount of the work which had been performed and instituted arbitration proceedings in New York under the terms of the contract. The arbitration decision, which was issued May 6, 1982, awarded petitioner payment for work done, provided that --- would return the aircraft at its expense to petitioner's Burbank facility, and provided for petitioner to deliver the aircraft to --- at a point outside California at petitioner's expense. --- acknowledged that it had removed the aircraft from petitioner's facility without notice or right.

The aircraft was returned by --- to petitioner on July 23, 1982. Petitioner conducted a final checkout and test flight on that date, and delivered the aircraft to --- in --- on the next day July 24, 1982.

The auditor concluded that delivery of the property sold by petitioner to --- occurred on December 20, 1980, when --- agents removed the aircraft from petitioner's facilities. The sale was regarded as having taken place in California and tax was asserted on the amount of the sale.

Petitioner contends that the order of the arbitration panel for return of the aircraft to California was for the purpose of allowing petitioner to deliver the aircraft outside California and thus avoid sales tax as was contemplated in the contract. Petitioner contends that the taking of the aircraft by --- agents did not constitute delivery by petitioner, because the transfer was not voluntary. Petitioner points out that Section 1201(14) of the Commercial Code defines "delivery" as a voluntary transfer. Petitioner states that it would have taken steps to prevent --- agents from taking the aircraft had petitioner known of --- plans. Petitioner argues that delivery took place in --- on July 24, 1982; therefore, the sale was an exempt sale in interstate commerce.

Analysis and Conclusions

Sales and Use Tax Regulation 1620 provides in subdivision (a) (3) (A) that sales tax applies when the property sold is delivered to the purchaser or his representative in this state, whether or not the disclosed or undisclosed intention of the purchaser is to transport the property to a point outside this state, and whether or not the property is actually so transported. --- agents obtained possession of the aircraft in this state. The question is whether the taking of the aircraft by the agents of --- constituted a delivery in this state by petitioner.

Petitioner cites subdivision (14) of Section 1201 of the Commercial Code as support for its position that it did not deliver the aircraft in California. That subdivision reads:

"(14) 'Delivery' with respect to instruments, documents of title, chattel paper or securities means voluntary transfer of possession."

This subdivision, by its terms, does not apply to delivery of tangible personal property.

Black's Law Dictionary defines "delivery" as the act by which the res or substance thereof is placed within the actual or constructive possession or control of another. Poor v. American Locomotive Co., 67 F.2d 626. What constitutes delivery depends largely on the intent of the parties. Jones v. Young, 539 S.W.2d 901.

It appears that the concept of "delivery" comprises elements of participation, agreement, or voluntary action. The concept could also include permissiveness if not action. Here the taking by --- involved none of these elements. We conclude that petitioner did not deliver the airplane to --- in California on December 20, 1980. To conclude otherwise would be to negate an important element of the arbitration decision, which was to return the parties to their original positions. Petitioner is regarded as delivering the aircraft to --- on July 24, 1982.

Recommendation

Delete the protested item from the amount subject to tax. Redetermine without other adjustment. Petitions Unit to make adjustment.

H. L. Cohen, Hearing Officer

8/22/83
Date

REVIEWED FOR AUDIT:

Principal Tax Auditor

Date